IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 601 of 2000

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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KHIMJI RANCHHODBHAI KOLI
Versus
STATE OF GUJARAT

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Appearance :
None for the Appellant
MS AC RAVAL, ADDITIONAL PUBLIC PROSECUTOR for the Opponent

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

and

HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

Date : 21/11/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE C.K.BUCH)

1. This appeal is listed for final hearing. Unfortunately, Mr.Trivedi, learned counsel appearing for the appellant, is absent.

Earlier, on 26.06.2007, this appeal was listed before the Division Bench of this Court, but Mr.Trivedi, learned counsel appearing for the appellant, was absent. It was possible for the Court to dispose of the appeal on merits with the assistance of the learned Additional Public Prosecutor. However, in the interest of justice, the Court decided to issue notice to the learned counsel, intimating him about the next date of hearing by passing order and the hearing of the appeal was fixed on 13.07.2007. On 13.07.2007 again, learned counsel Mr.Trivedi failed to appear for the appellant and the Court decided to issue fresh notice in reference to the earlier order passed on 26.06.2007.

The endorsement in the cause list shows that the notice is not received back.

2. Reasonable efforts have been made by this Court to see that the appellant gets an opportunity to address the Court on merits, as he has been held guilty of the charges punishable under Sections 366 and 376 of the Indian Penal Code.

3. Ms.Archana C.Raval, learned Additional Public Prosecutor, appearing for the State submitted that she would assist the Court

and the hearing of the appeal may be undertaken today, as the appeal is of the year 2000 and the Sessions Case decided by the trial Court was of the year 1998. As it is not legally possible for the Court to dismiss the appeal for want of prosecution, we have decided that the appeal be heard on merits.

4. Record and Proceedings are before the Court. Learned Additional Public Prosecutor has taken us through the relevant part of the evidence recorded during the course of trial, including the evidence led by the Medical Officer examined to prove the grave charge of rape, allegedly committed on the victim.

After going through the deposition of the victim – P.W.No.3, Exh.15, Ms.Archana C.Raval, learned Additional Public Prosecutor, has fairly submitted that it would not be possible for her to support the order of conviction considering the totality of circumstances emerging from the evidence and the contents of the complaint initially filed by the father of the victim girl. To appreciate the submissions and the legality and validity of the order under challenge, firstly it would be beneficial to state the impeachment that was placed in the form of charge against the appellant accused.

5. It is alleged that the appellant accused, resident of village Khorana, abducted the victim on 18.05.1998 at about 04.00 am. She was induced to leave her parental home and she was taken at various places, including Viramgam and Rajkot and there, she was raped by the appellant accused. The accused was of 28 years of

age and he was married person. He developed acquaintance with the victim as both of them were working in an agricultural field as labourers.

According to prosecution, on many occasions, the appellant accused had established sexual intercourse with the victim against her will and wish. As per the complaint, the first basic document, the age of the victim was 18 years. After some days, accused as well as the victim both returned to their native village and the victim went to her parental home. Thereafter, she had gone to her grant-father's house. On the date of her interrogation by the police, i.e. the date on which her statement was recorded, the victim was residing at her grand-father's house.

After investigation, the police found that offences punishable under Sections 363, 366 and 376 of the Indian Penal Code have been committed by the appellant accused and therefore, formal charge was framed by the learned trial Judge vide Exh.1.

6. As there was no evidence to show that the victim was below 18 years of age on the date of incident, the learned trial Judge has decided to acquit the appellant accused for the offences punishable under Section 363 of the Indian Penal Code. However, the learned trial Judge found that accused, being a married man, had induced the girl aged about 18 years and the physical relations established by the appellant accused with the victim were against her will and wish and thereby, the appellant accused has committed offences

punishable under Sections 366 and 376 of the Indian Penal Code.

7. On plain reading of the medical evidence led by the prosecution, it is not possible for us to say that any physical violence or force perhaps was made on any occasion, as there was no mark of violence on the body of the victim on the date on which she was examined by the Doctor. So it is not possible for this Court to express agreement with the findings recorded by the learned trial Judge that the medical evidence in anyway supports the case of the prosecution. We have carefully seen the certificates issued by the Doctor which are at Exhs.9 and 12A respectively. Exh.9 is the certificate of physical examination of the appellant accused and Exh.12A is the certificate issued by Medical Officer, R.Z.Hospital, Rajkot.

8. Undisputedly, there is evidence to show that the victim was more than 18 years of age, because it is contended by the complainant father that his younger child was of 15 years of age and that child was the forth. Of course, he has attempted to say that there was difference of one year between all the four children and the victim was the eldest child. In view of the contents of the certificate issued by the Medical Officer and other socio-biological reasons, it is inferable that the victim must be about 18 ½ years of age.

9. In the deposition of the victim, she has stated that she left her home at about 04.00 am at her own and had reached to Vankaner

Railway Station and thereafter, she started journey with the appellant accused. It is her admission that prior to the incident, she developed acquaintance and personal relations with the appellant accused as both of them were working in an agricultural field as labourers. She was also aware that the appellant accused was a married man and the wife of the appellant accused was also some times doing work of labour with them.

10. According to us, the learned trial Judge has committed a grave error in holding that the appellant accused, though was a married man, induced the girl so that she may leave her parental home and the victim had left on that count only. The victim girl was a prudent and matured girl and her evidence itself shows that her act of leaving the parental home cannot be said to be abduction within the meaning of Section 362 of the Indian Penal Code and the appellant accused ought not to have been linked with the offences punishable under Section 366 of the Indian Penal code. The birth certificate of the victim girl produced at Exh.26 shows the date of birth of the victim as 02.11.1978. So on the date of incident, she was about 19 years of age. This fact cuts the case of prosecution.

11. So far as charge for the offence punishable under Section 376 of the Indian Penal Code is concerned, the victim has denied the suggestion that on all occasions she had established physical relations against her will and wish and she was raped by the accused. From the reading of the deposition of the victim girl –

P.W.3, Exh.15, it is clear that the victim girl had accompanied the appellant accused. She moved with the appellant accused with her will and wish at various places and ultimately, both of them decided to return to their native village. Her act of returning to her parental home and immediately leaving that home and started residing in the house of her grand-father, speaks something which suggests that she had left her parental home on her will and wish. When the victim has deposed that they were sleeping in an open place in the Racecourse Area of Rajkot, which is a well known area, it would not be possible for us to accept that she could have been raped by the appellant accused.

It is apparent that this is a case of consent. The learned trial Judge ought to have acquitted the appellant accused, observing that the prosecution has failed in establishing the charge beyond reasonable doubt. The prosecution was under an obligation to establish the rape defined under Section 375 of the Indian Penal Code and the evidence in this regard is found inadequate. It is possible for us to infer that the finding of guilt recorded by the learned trial Judge is more moral than legal. In absence of legal clinching evidence, appellant accused cannot be held responsible for such a serious offence punishable under Section 376 of the Indian Penal Code. Appellant accused, according us, deserves acquittal. The learned Additional Public Prosecutor has made all deliberations and has fairly accepted that this is a case where it is not possible for her to support the judgment and order under challenge.

12. For the reasons aforesaid, the appeal is hereby allowed. Judgment and order of conviction and sentence passed by the learned 5th Extra Assistant Judge, Rajkot in Sessions Case No.212 of 1998 dated 21.06.2000 is hereby quashed and set aside. The accused is ordered to be acquitted. Amount of fine, if paid by the appellant accused, be refunded to him on proper identification. Appellant accused is on bail. His bail bonds stand discharged.

(C.K.BUCH, J.)

(RAVI R.TRIPATHI, J.)

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